SUPREME COURT, U. S.

DEC 17 1966

JOHN F. DAVIS, CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1966

No. 875

THOMAS N. BURBRIDGE, LILY KOWALSKI, CAROLYN MULLEN, SUSAN CLOKE, MARGOT LIEBERMAN, KENNETH S. KING, ROBERT H. JOHNSON, RICHARD H. MIKESELL, ALLEN W. JOHNSON and ESTHER M. JOHNSON,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRITS OF CERTIORARI

to the Appellate Department of the Superior Court of the City and County of San Francisco, State of California, and to the Supreme Court of the State of California

HARTLY FLEISCHMANN,
593 Market Street,
San Francisco, California 94105,
Attorney for Petitioners.

PERHAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Citation to opinions below	2
Constitutional and statutory provisions	3
Questions presented	5
Statement of facts	6
Argument	10
I. Section 407 of the Penal Code of the State of California is an arbitrary and unreasonable invasion of personal rights and liberties because it makes criminal conduct which in itself is innocent and lawful	10
A. The section is vague, ambiguous and indefinite and it establishes no ascertainable standard of guilt. It is therefore in violation of the Fourteenth Amendment to the United States Constitution	10
B. Section 407 subjects persons to arbitrary arrest and trial and makes preparation and defense impossible	12
C. Section 407 is void as an overbroad statute regulating freedom of speech	13
II. The convictions of petitioners are not supported by the statutes under which they were charged by the evidence	14
A. Penal Code § 602j does not apply to the facts of this case	14
B. The People and the Cadillac Motor Car Division consented to petitioners' entry and to the assembly and misled petitioners as to the legality of their conduct	17
C. Petitioners have been denied due process of law by the application of the doctrine of trespass ab initio in this case	18
III. Petitioners were entitled to introduce evidence to show that their conduct was reasonable and necessary to the effective exercise of their rights of free speech and assembly	20
IV. The sentences violate Amendments VIII and XIV of the United States Constitution	25
V. The conditions of probation tendered to petitioners were void	26

Table of Authorities Cited

Cases	Pages
Bouie v. South Carolina, 378 U S 347 (1964)	19
Brown v. Louisiana, 15 L Ed 2d 637 (1966)	22, 24
Cantwell v. Connecticut, 310 U S 296 (1940)	13
Cox v. Louisiana, 379 U S 536 (1965)	18, 21, 22
Dennis v. United States, 341 U S 494 (1951)	22
Edwards v. South Carolina, 372 U S 229 (1963)	14, 21, 22, 23
Ex parte Harter, 9 C A 2d 153, 49 P 2d 304 (1935)	11
Ex parte McCue, 7 C A 765, 96 P 110 (1908)	12
Ex parte Williams, 158 C 550, 111 P 1035 (1910)	11
Garner v. Louisiana, 368 U S 157 (1961)	21, 22
Henry v. City of Rock Hill, 376 U S 776 (1964)	21
In re Newbern, 53 C 2d 786, 3 C R 364 (1960)	11
In re Scarborough, 76 C A 2d 648, 173 P 2d 825 (1946)	26
Krauser v. San Bernardino Co., 29 C 2d 766, 178 P 2d 441 (1947)	16
Kunz v. New York, 340 U S 290 (1951)	12, 13
Lanzetta v. New Jersey, 306 U S 451 (1939)	11
Lombard v. Louisiana, 373 U S 267 (1963)	22
National Labor Relations Board v. Babcock and Wilson Company, 351 U S 105	23
People v. Blakeman, 170 C A 2d 596, 339 P 2d 202 (1959)	26
People v. Brown, 236 A C A 709, 47 C R 662 (1965)	19
People v. Carskaddon, 49 C 2d 423, 318 P 2d 4 (1957)	12
People v. Palm Springs City, 51 C 2d 38, 331 P 2d 4	16
Peterson v. Greenville, 378 U S 244 (1963)	22
Raley v. Ohio, 360 U S 423 (1959)	17, 18, 21
Robinson v. California, 370 U S 660 (1962)	25
Shuttlesworth v. Alabama, 15 L Ed 2d 176 (1965)	21, 22
Smith v. California, 361 U S 147 (1959)	12, 14

Pages

Taylor v. Louisiana, 370 U S 154 (1962) 21
Thompson v. Louisville, 362 U S 199 (1960) 22
Thornhill v. Alabama, 310 U S 88 (1940) 13, 23
Trop v. Dulles, 356 U S 86 (1958) 25

Weems v. United States, 217 U S 349 (1909) 25
Wright v. Georgia, 373 U S 284 (1963) 14, 22

Codes

California Civil Code:
Section 659 16

California Penal Code:
Section 407 ..... 4, 5, 6, 8, 10, 11, 12, 13, 18
Section 408 4
Section 409 ..... 4, 6, 8, 10
Section 415 6
Section 602j 4, 6, 7, 8, 13, 14, 16, 18
Section 602(1) 16
Section 602.5 16
Section 654 8
Section 1176 10

Constitutions

United States Constitution:
First Amendment 3, 14, 22, 23
Fifth Amendment 3
Fourteenth Amendment 3, 19

Statutes

28 U.S.C. Section 1257(3) 2

Texts

Richardson, Freedom of Expression and the Function of the Courts, 65 Harv. L. Rev. 1 (1951) 23

16 Stanford Law Review, 966 25

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1966

No.

THOMAS N. BURBRIDGE, LILY KOWALSKI, CAROLYN MULLEN, SUSAN CLOKE, MARGOT LIEBERMAN, KENNETH S. KING, ROBERT H. JOHNSON, RICHARD H. MIKESELL, ALLEN W. JOHNSON and ESTHER M. JOHNSON,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondents.

PETITION FOR WRITS OF CERTIORARI

to the Appellate Department of the Superior Court of the City and County of San Francisco, State of California, and to the Supreme Court of the State of California

Petitioners pray that a Writ of Certiorari issue from this Court to review the judgments of the Appellate Department of the Superior Court of the State

of California, in and for the City and County of San Francisco, and of the Supreme Court of the State of California in this case.

CITATION TO OPINIONS BELOW

The judgment of the trial court in this case is unreported. The opinion of the Appellate Department of the Superior Court of the State of California in and for the City and County of San Francisco is printed as Appendix A to this Petition and is otherwise unreported. No opinions were written on denial of petitioners' Petitions for Writ of Habeas Corpus in the District Court of Appeal or in the Supreme Court of the State of California.

The judgment of the Appellate Department of the Superior Court was entered on September 7, 1966 and rehearing was denied by that court on September 19, 1966. The Appellate Department refused to certify the case to the District Court of Appeal so that there was then no possible appeal to any other California court. A Petition for Writ of Habeas Corpus was filed in the District Court of Appeal on November 9, 1966 and denied on November 10, 1966. An identical petition was then filed in the Supreme Court of California on November 25, 1966 and denied on December 7, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Constitution, Amendment One:

AMENDMENT I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Constitution, Amendment Five:

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution, Amendment Fourteen, § 1:

AMENDMENT XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Penal Code of the State of California, § 407:

§ 407. Unlawful assembly; definition

"UNLAWFUL ASSEMBLY" DEFINED. Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly. (Enacted 1872.)

Penal Code of the State of California, § 408:

§ 408. Rout and unlawful assembly; punishment

PUNISHMENT OF ROUT AND UNLAWFUL ASSEMBLY. Every person who participates in any rout or unlawful assembly is guilty of a misdemeanor. (Enacted 1872.)

Penal Code of the State of California, § 409:

§ 409. Riot, rout, or unlawful assembly; remaining present after warning to disperse

REMAINING PRESENT AT PLACE OF RIOT, ETC., AFTER WARNING TO DISPERSE. Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor. (Enacted 1872.)

Penal Code of the State of California, § 602j:

Every person who willfully commits any trespass by either . . . (j) Purpose to injure. Entering

any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of such land, his agent or by the person in lawful possession;

QUESTIONS PRESENTED

1. Is § 407 of the Penal Code of the State of California void for vagueness and does it fail to establish an ascertainable standard of guilt?

2. May the doctrine of trespass ab initio be applied in this case for the first time in California?

3. Can a trespass statute referring to "lands" be applied to buildings?

4. Could the trial court, consistently with the First, Fifth and Fourteenth Amendments, exclude evidence intended to show that petitioners' conduct was a reasonable and necessary exercise of their rights of free speech and assembly under all the prior and existing circumstances of the case?

5. Did the State effectively consent to the commission of the offenses charged?

6. Were the offered conditions of probation invalid?

STATEMENT OF FACTS

The petitioners were participants in a demonstration which occurred in the showroom of the Cadillac Motor Car Division of General Motors Company at Van Ness Avenue and O'Farrell Street in San Francisco on April 11, 1964. As a result of this demonstration, they were charged with violation of §§ 407, 409, 415 and 602j of the Penal Code of the State of California, and after a jury trial in the Municipal Court of the City and County of San Francisco, State of California, they were acquitted of violation of § 415 and convicted of violations of the other sections.

The convictions arose out of the conduct of the petitioners and others in staging a demonstration to protest and to publicize discrimination by the Cadillac Motor Car Division in hiring and, perhaps more important, to protest the absolute refusal of that organization to discuss its policies with State or local officials or with the National Association for the Advancement of Colored People. The acts for which these petitioners were convicted consisted entirely of those which occurred upon, and after their entry into, the Cadillac premises which were otherwise open to the public. Petitioners, having marched through them while singing and chanting, then refused to leave when ordered to do so by the manager and by a police officer. The evidence shows that the demonstrators, including petitioners, were disciplined in their order of march and that they quieted down when they were told to do so. (e.g. R.T. 33, 81, 83.) The evidence is clear that the Cadillac Motor Car Division was housed in a struc-

ture and was neither fenced nor unenclosed (R.T. 19) and it shows that although the demonstrators, again including petitioners, were doing the same things outside the building as they were in it both before and after the arrests of petitioners (R.T. 105-107, 117-118), there were no arrests or charges on account of any conduct which occurred outside the building either by petitioners or others. (R.T. 159.) In fact, the testimony is that it was the policy of the San Francisco police department not to arrest for such conduct outside. (R.T. 159.)

The testimony further demonstrates that absolutely no attempt was made to exclude the demonstrators, including petitioners, from the premises of Cadillac even though the police department had been forewarned of the demonstration, even though the officers had written material indicating that they were prepared to arrest for trespass and even though many policemen both uniformed and in plain clothes were in attendance at the time of the entry. (R.T. 70-71, 161, 162, 172, 174.)

The trial court refused to give all proffered instructions concerning the right of free speech. It further refused to give petitioners' Instruction No. 38 which would have compelled the jury to find an unlawful entry in order to convict for trespass but it gave the prosecution's Instruction No. 22 which stated in effect that § 602j was violated when petitioners remained on the premises after having been instructed to leave.

Petitioners were finally sentenced by the trial court as follows: Thomas N. Burbridge—three months in

County Jail on each count to be served consecutively. Robert Johnson, Lily Kowalski, Richard Mikesell and Carolyn Mullen—fifteen days in the County Jail on each count to be served consecutively. Margot Lieberman, Kenneth King, Susan Cloke, Allan W. Johnson and Esther M. Johnson—ten days in County Jail, suspended, six months' probation and fine of $56 for violation of § 602j, thirty days in the County Jail, suspended, and six months' probation for violation of § 409 and sentence for violation of § 407 suspended. Petitioners Allan and Esther Johnson, Margot Lieberman, Kenneth King and Susan Cloke were all sentenced by a different judge from the one who sentenced the other petitioners.

On appeal, the Appellate Department of the Superior Court in and for the City and County of San Francisco modified the sentences of Petitioners Burbridge, Robert Johnson, Kowalski, Mikesell and Mullen so that the sentences for violations of § 602j and § 409 of the Penal Code ran concurrently, this conclusion having been dictated by the court's opinion that the doctrine of trespass ab initio applied to petitioners' conduct and by its interpretation of § 654 of the Penal Code. See Appendix A.

All of the petitioners who were sentenced to serve time in the County Jail were originally offered informal probationary sentences by the trial court, which in all cases, except that of petitioner Burbridge, consisted of fines of $50 on each count or ten days in the County Jail plus five days on each count in the

County Jail to be served consecutively and, as a condition of probation, the court imposed the following:

> "As a condition of probation first you will obey all laws during the probationary period. Secondly you are ordered not to plan, or aid, or abet, or take part, or be present in any demonstration of the general nature of those forming the basis of these actions during the probationary period. Also, during the probationary period in the event you are arrested for any lawful cause by any peace officer you will submit peaceably to such arrest, and you will not sit down, or go limp, or in any other way obstruct or unduly inconvenience said peace officer in the lawful performance of his duties."

Petitioner Burbridge was offered informal probation of three years plus fines of $300 on each count and twenty days in the County Jail on each count, all sentences to be served consecutively and in addition to the conditions of probation quoted above, the following was added:

> "Also, during the period of your probation, and while employed by the University of California, you are ordered not to incite, or encourage students of the University of California, or any other educational institution to engage in action or conduct in any violation of, or in violation of the law."

All petitioners rejected these conditions of probation.

The constitutional issues presented in this Petition for Writs of Certiorari are generally raised throughout the proceedings below, beginning with Demurrer,

and continuing with repeated objections at the trial and to the instructions. (See California Penal Code, § 1176.) All of the objections were raised in the Appellate Department and on Petitions for Writ of Habeas Corpus.

ARGUMENT

I. SECTION 407 OF THE PENAL CODE OF THE STATE OF CALIFORNIA IS AN ARBITRARY AND UNREASONABLE INVASION OF PERSONAL RIGHTS AND LIBERTIES BECAUSE IT MAKES CRIMINAL CONDUCT WHICH IN ITSELF IS INNOCENT AND LAWFUL.

A. The section is vague, ambiguous and indefinite and it establishes no ascertainable standard of guilt. It is therefore in violation of the Fourteenth Amendment to the United States Constitution.

Petitioners were charged with being present at and failing to disburse from an unlawful assembly, both crimes being specified as misdemeanors by §§ 408 and 409 of the Penal Code.

Section 407 and the complaint in this case defines unlawful assembly as follows:

> "Whenever two or more persons . . . do a lawful act in a violent, boisterous or tumultuous manner, such an assembly is an unlawful assembly."

This definition covers a vast spectrum of activity, most of which is perfectly legal and it does not give fair notice to any person of exactly what conduct is proscribed. The words "boisterous" and "tumultuous" do not have any legal signification—the word "boisterous" according to Webster implies "something rough and noisy; clamorous; unrestrained," and the word

"tumultuous", again according to Webster, implies "commotion, uproar and disorder." There is, of course, no evidence in this record of any violence or even of damage to property (see, especially, R.T. 80-83) and the testimony indicates that the conduct of the demonstration was orderly and quite under the control of petitioner Burbridge. But beyond this, the chief infirmity of the statute is the use of the word "lawful" and this problem will be discussed in subsequent paragraphs. Suffice it to say here that the cases in California and in this Court are quite clear to the effect that criminal statutes must establish specific standards against which guilt or innocence may be determined and against which arresting officers must act. *Lanzetta v. New Jersey,* 306 U S 451 (1939); *In re Newbern,* 53 C 2d 786, 3 C R 364, 368, 371 (1960); *Ex parte Williams,* 158 C 550, 111 P 1035 (1910); *Ex parte Harter,* 9 C A 2d 153, 49 P 2d 304 (1935).

The statute here in issue has extensive and obviously innocent applications. Indeed, as demonstrated by at least one colloquy in the record (R.T. 88) any ball game could be an unlawful assembly. More to the point, during the trial of this very case, the newspapers were full of descriptions of "boisterous" and "tumultuous" and even "violent" conduct of delegates to the Republican Convention of 1964.

The paragraphs which follow will outline and discuss the difficulties created in this particular case by the vagueness of § 407.

B. Section 407 subjects persons to arbitrary arrest and trial and makes preparation and defense impossible.

Perhaps the major vice of § 407 and of any vague criminal statute is that it permits the interference of officials in the lives of citizens at the whim of the officials. In addition to the examples cited in the previous paragraphs of this petition where arrest is simply a matter of unfettered discretion, it will be fruitful to consider the facts at bar. The record is entirely clear that petitioners' conduct outside the Cadillac Agency was the same as it was after they went inside —in both cases, they were singing, clapping, chanting and marching. Yet no arrests were made until after petitioners were permitted to enter the building. Apart from the fact that this permission to enter constituted a consent and a valid defense in itself of which more will be made, here the point should be obvious that the vagueness of § 407 made it possible for the police and for the Cadillac Agency at an arbitrary point in a continuous and homogenous course of conduct to decide that a crime was being committed and then to make arrests. See, e.g., *Smith v. California,* 361 U S 147 (1959); *Kunz v. New York,* 340 U S 290 (1951); see also, *Ex parte McCue,* 7 C A 765, 96 P 110 (1908) and compare, *People v. Carskaddon,* 49 C 2d 423, 318 P 2d 4 (1957).

But the effect of this statute in permitting arbitrary action by police and complaining witnesses is as nothing compared to the confusion it raises when a defense against its enforcement is attempted. The statute refers to a "lawful act." Petitioners acting

identically inside and outside the Cadillac Agency were not arrested outside. They must have been performing a lawful act outside. Their acts inside were no different unless it can be said to have been a trespass which was an *unlawful* act or else the trespass itself was legal, in which event those convictions should be reversed without more. Very simply, petitioners here have been charged with performing a lawful act *inside* the Cadillac Agency. If it was lawful to be inside the Agency, then it could not have been unlawful to trespass and it would seem clear in view of this antinomy that one of the two charges under §§ 407 and 602j cannot stand. The Appellate Department dimly recognized this contradiction and sought to resolve it first, by adopting the trial court's doctrine of trespass ab initio and secondly, by applying it partially under § 654 of the Penal Code. As is pointed out in later portions of this petition, this reasoning is unconstitutional and inadequate.

C. Section 407 is void as an overbroad statute regulating freedom of speech.

A statute purporting to condemn criminal conduct in vague and overbroad terms is especially subject to constitutional question when the conduct involved is thought to be an exercise of the right of free speech. *Thornhill v. Alabama,* 310 U S 88 (1940). This is especially true where arbitrary discretion is vested in an administrative officer, *Kunz v. New York,* 340 U S 290 (1951), and compare, *Cantwell v. Connecticut,* 310 U S 296 (1940). As the case at bar demonstrates, § 407 permits the arbitrary interference of police, at

their whim, with a right of free speech and it is therefore void. See *Smith v. California,* 361 U S 147, 150-151 (1959).

In the case of *Wright v. Georgia,* 373 U S 284 (1963) the Supreme Court was dealing with the conviction of six Negroes for playing basketball in a public park and refusing to leave on order of the police. The statute defined unlawful assembly in terms of disturbing the peace. The court reversed the conviction, saying the statute was too vague. 373 U S 292-293. The reasoning of the *Wright* case applies specifically to demonstrations and to the First Amendment to the United States Constitution. *Edwards v. South Carolina,* 372 U S 229 (1963), held that a breach of the peace conviction violated the First Amendment where the evidence showed that the defendants had organized a demonstration on the grounds of the State House and that they there sang, clapped and stamped their feet. The court held that the petitioners were protected by the First Amendment. See 372 at p. 237.

II. THE CONVICTIONS OF PETITIONERS ARE NOT SUPPORTED BY THE STATUTES UNDER WHICH THEY WERE CHARGED BY THE EVIDENCE.

A. Penal Code § 602j does not apply to the facts of this case.

Section 602j of the Penal Code provides:

"Every person who willfully commits any trespass by either . . . entering any lands whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with

> the intention of interfering with, obstructing or injuring any lawful business or occupation or by the person in lawful possession . . . is guilty of a misdemeanor."

The plain meaning of this section is that it applies only to unimproved farm or range land. This is evidenced by the phrase "lands of another whether unenclosed or enclosed by fence." In California, it is a principle of construction of criminal statutes that the defendant "must be given the benefit of every reasonable doubt as to whether the statute was applicable to him." *In re Zerbe,* 60 C 2d 666, 668, 36 C R 286 (1964) and it has further been said that "Penal statutes will not be given application beyond their plain intent. Such acts include only those offenses coming clearly within the import of the language." *DeMille v. American Federation of Radio Artists,* 31 C 2d 139, 156, 187 P 2d 769 (1947); cf. *McBoyle v. United States,* 283 U S 25 (1931); and see, *People v. Carskaddon,* 49 C 2d 423, 318 P 2d 4 (1957). "Crimes are not to be built up by courts with the aid of inference, implication and strained interpretation." *Ex parte McNulty,* 77 C 164, 168, 19 P 237 (1888) and "a crime is not to be built up by giving to the words that create it an unusual or seldom used meaning." *People v. Costello,* 138 C A 2d 894, 896, 291 P 2d 601 (1955).

Petitioners here argue that the plain meaning of the entire statutory provision sought to be applied to them makes it clear that the legislature had reference to farm or range lands. An examination, however, of authorities relating solely to the word "land" and

without prejudice to petitioners' broader contention here, shows that it refers to "the solid material of the earth," Civil Code, § 659, and has been so applied in the cases. *Krauser v. San Bernardino Co.*, 29 C 2d 766, 178 P 2d 441 (1947); *People v. Palm Springs City*, 51 C 2d 38, 331 P 2d 4.

That this construction of § 602j is the correct one and conforms to the legislative intent is made very plain by § 602(1) of the Penal Code which provides:

> "Every person who willfully commits any trespass by either . . . entering and occupying real property *or structures* of any kind without the consent of the owner, his agent or the person in lawful possession thereof . . . is guilty of a misdemeanor."

Thus, in the very identical statutory provision we find the legislature establishing two different paragraphs, one relating to "lands" and the other relating specifically to structures. Section 602.5 of the Penal Code also refers specifically to a "dwelling house, apartment or other such place" and again, it mentions consent of the owner. These two sections show that the legislature has defined very precisely the types of structures in which a trespass can be committed, the manner in which it can be committed and the conditions under which it can be committed.

The petitioners were not charged under the only applicable statutory provision for the obvious reason which will be discussed in subsequent paragraphs: not only could the prosecution not possibly prove that petitioners entered the property without consent, but all the evidence indicates that there actually was con-

sent as that word is normally interpreted. Thus the state has sought to twist the plain meaning of an otherwise inapplicable and outdated statute.

B. The People and the Cadillac Motor Car Division consented to petitioners' entry and to the assembly and misled petitioners as to the legality of their conduct.

The record in this case is replete with testimony to the effect that neither the police, who were present at the demonstration in force, nor the manager of the Cadillac Agency made the slightest attempt to prevent entry by the petitioners in the showroom. See, for instance, R.T. 70-71, 161, 162, 164, 172. There is further testimony that at other demonstrations on the same premises, demonstrators were permitted to enter, to conduct themselves as they did in the case at bar and to leave, all without arrest. At one of these prior demonstrations, announcements similar to those made here were made to the demonstrators. Finally, the record plainly shows that the conduct of the petitioners and the other demonstrators was the same outside the Cadillac Agency as it was inside. Yet the police made no arrests outside and indeed, had a policy which forbade such arrests. (R.T. 159.)

The facts of this case carry it far beyond the traditional criminal law doctrine of consent. What we have here is conduct by the public officials and the corporate officials involved which not only indicates consent but also can be said to have substantially misled the petitioners. In *Raley v. Ohio*, 360 U S 423 (1959) witnesses who had refused to answer questions of a State Legislative Investigating Commission on grounds of

self-incrimination were convicted for contempt of it as a result because an immunity statute negated the privilege. This Court reversed these convictions on evidence which showed that the commission itself had told the witnesses that the privilege was available to them and had not advised them that the immunity statute would deprive them of its protection. The Court's reasoning is best expressed at pp. 425-426 and 438. So in the case at bar. At the very least, the State acting through police officers and the Cadillac Agency has been contradictory in its treatment of these and other demonstrators not only historically, in the failure to arrest them on other occasions on the same premises, but also on the very date in question by failing to arrest them outside the premises and by failing to prevent their entry.

These principles have been applied more recently by this Court in *Cox v. Louisiana,* 379 U S 559 (1965). Cox was a Civil Rights leader convicted of picketing "near" a courthouse on facts which showed that the officials present gave permission for the demonstration to take place across the street from the courthouse. The police nevertheless arrested Cox even though the demonstration remained on the indicated side of the street. The Court, relying on *Raley v. Ohio,* supra, reversed the conviction. See 379 U S at p. 5.

C. Petitioners have been denied due process of law by the application of the doctrine of trespass ab initio in this case.

Section 602j of the Penal Code in this case speaks only in terms of an "entering." Nevertheless, the trial court instructed the jury that that section could be

violated by remaining after being told to leave even though the original entry was lawful and the trial court further refused to give petitioners Instruction No. 22 which would have limited a violation of § 602j to an unlawful entry. It has already been pointed out that § 407 refers to a lawful action, that petitioners' conduct inside and outside the Agency was identical but that petitioners were not arrested and no one was arrested for conduct outside the Agency and that this antinomy has made defense of this case practically impossible. But beyond this basic unfairness to petitioners in their trial, application of the doctrine of trespass ab initio in this case is the first such interpretation of a trespass statute in California criminal law. In fact, such an application has previously been expressly rejected in a similar California case, *People v. Brown,* 236 A C A 709, 47 C R 662 (1965). There is no question that application of such a doctrine for the first time to these petitioners is a denial of due process under the Fourteenth Amendment to the United States Constitution. *Bouie v. South Carolina,* 378 U S 347 (1964). In that case, this Court expressly held that the word "enter" could not be construed to mean "remain" where no such construction had been given before. It would therefore seem clear that petitioners are entitled to a new trial on this point.

III. PETITIONERS WERE ENTITLED TO INTRODUCE EVIDENCE TO SHOW THAT THEIR CONDUCT WAS REASONABLE AND NECESSARY TO THE EFFECTIVE EXERCISE OF THEIR RIGHTS OF FREE SPEECH AND ASSEMBLY.

At the trial in this case, petitioners sought to produce evidence which included:

1. Evidence of the illegal discriminatory hiring practices of the Cadillac Motor Car Agency.

2. Evidence of official attempts by duly constituted officers of the State of California and of the City and County of San Francisco to discuss these hiring practices with Cadillac and to change them.

3. Evidence of repeated attempts by petitioners to discuss these hiring practices.

4. Evidence that petitioners reasonably believed their conduct was the only effective way to bring this situation to the attention of the Cadillac Agency and to the attention of the public.

The trial court steadfastly refused to permit the slightest hint of this sort of evidence either on cross-examination (R.T. 59, lines 14 through 65), on petitioners' case in chief (R.T. 293-295) or on direct and redirect examination of petitioners themselves (R.T. 237-253, 297, 320-321, 329, 350, 357-359.) Indeed, this evidence was excluded even though the prosecution was permitted to cross-examine on these issues (R.T. 261-264, 266, lines 25 through 267, line 8, 277, line 9 through 278, line 26, 317, 346, line 12 through 21.) The trial court initially made the fundamental assumption that the petitioners were guilty because they entered the Cadillac Agency and marched and sang there.

Petitioners do not argue that they had the absolute right to go on the Cadillac premises to protest. They do argue that within the due process clause and the First Amendment they had the right to introduce evidence at their trial showing that this action was reasonable and necessary to make effective their First Amendment rights and to guarantee them a fair trial.

This Court has protected civil rights activities intended to bring to public attention and to remedy racial discriminatory practices of one sort or another. In so doing it has sanctioned conduct which undoubtedly interferes with the conduct of business, *Garner v. Louisiana,* 368 U S 157 (1961) and which might otherwise have been thought to have disturbed the peace. *Henry v. City of Rock Hill,* 376 U S 776 (1964); *Edwards v. South Carolina,* 372 U S 229 (1963). The decisions show three separate grounds for the Court's actions. In the first place, convictions have been reversed where the statutes under which they were obtained are vague or too broad. These cases are treated with specific reference to their application to demonstrations such as the one at bar. Second, the Court has found in some cases that there has been a denial of due process in convictions under disturbing the peace, unlawful or other assembly statutes because the evidence is wholy insufficient to support the charge. *Garner v. Louisiana,* supra; *Taylor v. Louisiana,* 370 U S 154 (1962); *Shuttlesworth v. Alabama,* 15 L Ed 2d 176 (1965) or that public officials have themselves played a part in the crime. *Cox v. Louisiana,* 379 U S 536 (1965) and see, *Raley v. Ohio,* 360 U S 425 (1959).

But third, and for our purposes most important, the Court has held that conduct which might otherwise be disturbing the peace cannot be punished if to do so limits First Amendment rights. *Edwards v. South Carolina,* supra, *Brown v. Louisiana,* 15 L Ed 2d 637 (1966).

It may fairly be said that in all of the cases involving civil rights demonstrations the Court has recognized in one form or another that the demonstration itself, like picketing in a labor cause, is a form of communication and that it is protected by the Constitution. The Court has protected this right to demonstrate or to protest or to assemble whether the activity has been quiet, *Garner v. Louisiana,* supra, or vociferous, *Edwards v. South Carolina,* supra, and regardless of the type of statute sought to be invoked against it. See, for instance, *Shuttlesworth v. Alabama,* 15 L Ed 2d 176 (1965) (sidewalk ordinance); *Cox v. Louisiana,* 379 U S 536 and 379 U S 559 (obstructing public passages, breach of the peace and picketing near a courthouse) and cf. *Thompson v. Louisville,* 362 U S 199 (1960) (loitering and disorderly conduct); *Wright v. Georgia,* 273 U S 284 (1963) (unlawful assembly); *Peterson v. Greenville,* 378 U S 244 (1963) (trespass); *Lombard v. Louisiana,* 373 U S 267 (1963) (criminal mischief).

The entire meaning of these and all other cases involving free speech and the communication of protest is that there must be an adjustment between society's need for order and the right of an individual or group to speak *effectively. Dennis v. United States,* 341 U S

494 (1951); Richardson, *Freedom of Expression and the Function of the Courts,* 65 Harv. L Rev. 1 (1951). First Amendment rights do not exist solely in the wilderness and the Court is engaged constantly in an effort to protect and adjust those rights in situations where they are likely to influence others. If it were not for this effort, there would be no need for a First Amendment and there would be no litigation in this area. Under this reasoning, it makes no difference if anger or dissatisfaction is caused by speech. This is a necessary and desirable result of the exercise of the privilege. *Edwards v. South Carolina,* 372 U S 229, 237-238.

This reasoning is quite clearly borne out by cases involving picketing in labor disputes where the Court has clearly held that picketing is part of the right of free speech. See, e.g., *Thornhill v. Alabama,* 310 U S 88 (1940) and has suggested that the extent of this right is a function of all the circumstances of a case. *National Labor Relations Board v. Babcock and Wilson Company,* 351 U S 105.

The First Amendment cases mean nothing if they do not mean that the right to speak freely means the right to speak effectively and the Court has reached its present accommodation in this area because it has decided that picketing and demonstrating, though they have other, perhaps undesirable, results, are effective and reasonable means under all of the circumstances to publicize points of view.

Not only do the free speech cases stand for the proposition that the Court must weigh the facts and

surrounding circumstances as well as the competing interests of State, persons and parties in interpreting the First Amendment, but they also make clear that a variety of conclusions is possible in any given case if only the facts are permitted to be shown. Compare:

> "They sat and stood in the room quietly as monuments of protest against the segregation of the library."

with:

> "It was engaged in to achieve desegregation of the library through a request for service and a protest expressed by petitioners' continued presence. Petitioners were orderly and quiet. Their continued presence for a relatively short period of time did not interfere with the functioning of the library."

with:

> "A tiny, branch, parish library, staffed by two women . . . short of physical violence, petitioners could not have more completely upset the normal, quiet functions of the Quentin Branch of Audobon Regional Library." *Brown v. Louisiana,* 15 L Ed 2d 637, 644, 649 (1966). (Opinion of Court, Concurring Opinion, Dissenting Opinion.)

Thus the petitioners were denied their due process right to a fair trial because they were confined to and by a presentation of the immediate physical facts and were denied the opportunity to present facts to the trial court and to the jury which under appropriate instructions would have permitted an evaluation of their exercise of their asserted rights.

IV. THE SENTENCES VIOLATE AMENDMENTS VIII AND XIV OF THE UNITED STATES CONSTITUTION.

The total sentences imposed upon petitioners Burbridge, Mikesell, Mullen, Robert Johnson and Kowalski are far in excess of those usually meted out to first offender misdemeanants. Indeed, they are far in excess of the sentences imposed on other defendants convicted for participating in these very demonstrations and this Court can take judicial notice of those other sentences. In particular, petitioner Burbridge has been given an extremely harsh and long enduring sentence which is not consistent with his prior criminal record, which is non-existent, or with his position in the community which the Court clearly noted when it imposed the sentence. Such a sentence violates the cited Constitutional provisions. *Robinson v. California,* 370 U S 660 (1962); *Trop v. Dulles,* 356 U S 86 (1958); *Weems v. United States,* 217 U S 349 (1909) and see, generally, 16 Stanford Law Review, 966. In this connection, it may be pointed out with special reference to petitioner Burbridge that the California Constitution forbids cruel *or* unusual punishment and very clearly in the case at bar, his punishment is unusual not only in its severity as compared to punishments imposed on misdemeanants without prior offenses but in comparison to those imposed on other leading participants in these very demonstrations. At the very least, the word "unusual" would seem to imply that all persons similarly situated in the identical transaction would receive comparable sentences. That has not occurred in this case. In this connection, the Court's attention is called to footnote 32 in *Trop v. Dulles,* supra, at p. 100.

V. THE CONDITIONS OF PROBATION TENDERED TO PETITIONERS WERE VOID.

Petitioners Burbridge, Mikesell, Mullen, Kowalski and Robert Johnson refused probation, having been offered it on conditions which are clearly void because they are vague and ambiguous. They would have had the effect of subjecting petitioners to rearrest and imprisonment under a vague and overbroad appeals statute. In addition, they had the direct effect of limiting petitioners in their exercise of their rights under the First Amendment to the United States Constitution and even went so far as restricting petitioner Burbridge in his activities in his employment. Cases in this area indicate that there are limits to the Court's power to impose conditions. *People v. Blakeman,* 170 C A 2d 596, 339 P 2d 202 (1959) and *In re Scarborough,* 76 C A 2d 648, 173 P 2d 825 (1946).

Dated, San Francisco, California,
December 14, 1966.

Respectfully submitted,
HARTLY FLEISCHMANN,
Attorney for Petitioners.

(Appendix A Follows)